

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION

PAMELA PAUN,)	
Appellant,)	OSPI 31-82
)	
-vs-)	
)	
BOARD OF TRUSTEES,)	
CHOUTEAU COUNTY SCHOOL)	
DISTRICT #56, CHOUTEAU)	
COUNTY, MONTANA)	
Respondent.)	
and,)	<u>DECISION AND ORDER</u>
LEONARD MURPHY,)	
Appellant,)	OSPI 27-82
)	
-vs-)	
)	
BOARD OF TRUSTEES,)	
HAYS LODGE POLE PUBLIC)	
SCHOOLS, BLAINE CO. #50,)	
Respondent.)	

Upon stipulation and motion of counsel in both cases cited above and by order of this State Superintendent, these cases have been consolidated within this Decision and Order. The Decision and Order related to the sole question on appeal: Whether "to find (or hire or get) a better teacher" is a reason sufficient to meet the non-renewal notice required by Section 20-4-206 (3) MCA.

All teachers in the above entitled cause were non-tenured teachers. Their boards of trustees decided not to renew their teachers' contracts pursuant to Section 20-4-206 MCA. The teachers in these cases allege that the reason given, "that we can find a better teacher" is not sufficient to meet the statutory requirements of Montana law.

In both cases, the County Superintendent refused to conduct a hearing to decide the merits of the case. The decision to deny the appeal was similar in both cases.

Appellants also argued that nontenured teachers have a right to appeal before the County Superintendent of

Schools. This State Superintendent recently ruled in Gehring vs. School District #27, Liberty County, Montana, OSPI #23-82, dated March 21, 1983, that a nontenured teacher has no statutory right of appeal of a board of trustees' decision not to renew the contract for nontenured teacher under 20-4-206 MCA. See also Thomas Connolly vs. School District #1 Board of Trustees, Decision and Order issued April 12, 1979. Further, this State Superintendent has concluded that since there is no statutory right of appeal for nonrenewal of a nontenured teacher's contract, no controversy exists within the meaning of Section 20-3-210 MCA or under the definition of the Uniform Rules of School Controversy for the County Superintendent and the State Superintendent of Public Instruction. See section 10.6.102 Administrative Rules of Montana.

Appellants argue that nontenured teachers are not seeking a property or liberty interest. Appellant claims a specific statutory right to the reasons for termination of employment and that no reason has been supplied. Appellants argue that this State Superintendent should, as a matter of law, rule that the fact that the trustees feel they can "hire a better teacher" is not a reason for Appellants' termination as required by Section 20-4-206(3) MCA. In the alternative, they believe that this State Superintendent should remand the matter to the county superintendent with instructions to hold a hearing, if the parties cannot agree on a stipulation of facts, and to consider legal arguments prior to rendering a decision.

The issue of whether or not a controversy exists, and ultimately whether or not Appellant is entitled to a hearing before the county superintendent, can be clarified and resolved by the simple determination of the legal sufficiency of the reason given by the board of trustees for Appellant's renewal. A legal determination, not a factual determination, is required here.

In Robert Jones v. Ravalli County School District #15-6, OSPI 19-82, I extensively reviewed in a fourteen-page

opinion the status of nontenured teachers in Montana. I will extensively refer to Jones in this case. I discussed the importance of the board of trustees being able to govern school districts. The Montana Supreme Court in Yanzick v. School District #23, ___ Mont. ___, 641 P.2d 431, 39 St.Rptr. 191 (1982) recognized the vital and important role of the board of trustees which is vested with both statutory and constitutional rights to supervise, manage and control its school, including the hiring and firing of teachers.

A wide discretion is necessarily reposed in the trustees who compose the board. They are elected by popular vote, and, presumably, are chosen for reason of their long standing in the community, sound judgment, and their interest in the educational development of the young generation which is so soon to take the place of the old. See Yanzick.

The Court went on to state:

A teacher works in a sensitive area in a classroom. There he shapes the attitude of young minds towards a society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and duty to screen officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. Yanzick pp. 201, 202, 203.

As I stated in the Jones decision;

The legislature has indicated its desire to place local control of schools in the local school districts, especially control of teachers. The courts have continually recognized that control and affirmed their decisions. School District #12, Phillips County v. Hughes, 170 Mont. 267, 272-273, 552 P.2d 328, 331 (1976). School District #4 v. Kohlberg, 169 Mont. 368 (1969), Yanzick.

In Jones I cited B.M. a minor by Leona M. Burger, her guardian Ad litem v. State of Montana, et al., ___ Mont. ___ P2d ___ 39 St.Rptr. 1285 (1982). The case placed an additional concern, tort liability, on boards of trustees in their capacity to administer schools. The importance of the decision of B.M. again is wide ranging, in that the

court discussed public policy and the duties and responsibilities of school authorities and school boards to ensure that students in the state receive appropriate education. The Court placed direct responsibility on boards of trustees to maintain an educational standard of care.

As I stated in Jones:

The boards of trustees sit in a fiduciary capacity. They hold the helm of each school district, establishing and developing not only a competent system but more importantly the best educational system that public money can provide. They oversee the budgets and the public financing of schools on the local level and they maintain the ultimate decision on hiring and firing of teachers. They are directly accountable to the parents and students of a school system if sound education is not provided. They are also responsible to ensure that the educational school system does not meddle in mediocrity and just getting along, but does strive to achieve and seek excellent standards in teaching and preparing our youngsters as future adults of this state. The ultimate result of this duty and responsibility is to ensure that our youngsters are receiving the best education public money can buy and at the same time afford those well competent and accepted teachers in the school system privileges of tenure. See Jones pp. 7.

In Jones I traced the development of nontenured teacher protection. I cited Cookson v. Lewistown School District #22, 351 F.Supp. 983 (D. Mont. 1972). In that case a nontenured teacher argued that there was no determination of whether the reason provided by a school district was sufficient and legally proper under the Standards of Review of the Montana Administrative Procedures Act. In upholding the nonrenewal of a nontenured teacher justified by the school board on the basis that only average teaching could be expected from the teacher, the Court said:

It is quite clear that Montana has adopted an employment policy...which frees a school board from any tenure problems during the first three years of a

teacher's employment. These three years are the testing years during which not only may the teacher's merits be weighed, but the school's needs for a particular teacher assessed... (I)n the interests of creating a superior teaching staff a school board should be free during a testing period to let a teacher's contract expire without a hearing, without any cause personal to the teacher, and for no reason other than that the board rightly or wrongly believes that ultimately it may be able to hire a better teacher. Cookson, pp. 984-986.

At the time of Cookson, the Federal Court determined that the laws of Montana permitted a school district to terminate the services of a nontenured teacher without reason. In Jones I discussed the development of the law:

By 1975, (Mont. Laws Ch. 142) the Legislature amended what was then RCM 1947 Section 75-6505.1 (now Section 20-4-206(3) MCA) and required that the school district, if requested to do so, give the reasons for a failure to renew a nontenured teacher's contract.

Section 20-4-206(3), MCA provides:

When the trustees notify a nontenured teacher of termination, the teacher may, within 10 days after receipt of such notice, make written request to the trustees for a statement in writing of the reasons for termination of employment. Within 10 days after receipt of the request, the trustees shall furnish such statement to the teacher.

The legislature did not say that a nontenured teacher was provided with a new, substantive property interest or any right now enjoyed by a tenured teacher. The discretionary powers of the board of trustees and the local control were not altered.

This position was affirmed In the Matter of the Appeal of Evelyn J. Keosaian. Decision and Order rendered June 4, 1976 by Superintendent Dolores Colburg...

...although my predecessor found that the reason does not comport with the intent of the statute, she did affirm the decision of the board to terminate and upheld the validity of the termination. She went on to say:

The foregoing does not change the fact that Ms. Keosaian's employment with the district will ter-

minate at the end of her present contract since a statement of reasons is not a prerequisite to a valid termination.

The appeal was returned to the County Superintendent with instruction to order the Board of Trustees of School District No. 44, Flathead County, to give Ms. Keosaian a statement in writing of the reason or reasons for the termination of her services. One other significant statement made by Superintendent Colburg was that she accepted as true the Board's belief that it could find a better teacher. This case was not appealed, and Ms. Keosaian was not renewed.

A board's ability to not renew was reaffirmed five years later by Branch v. School Dist. No. 7, 432 F.Supp. 608 (D Montana 1977). There, another board said that it refused to reappoint a nontenured teacher because it "could hire a better teacher to complement the system." The teacher claimed that retaliation for her criticism was the real reason for the non-reappointment. In upholding the board the court noted that "(t)he problem posed here is not whether there was good cause for not renewing the plaintiff's contract but whether it was not renewed for some impermissible cause." Branch P. 610. In the court's opinion, the plaintiff was "an able and effective teacher," but the court refused to substitute its judgment for the school board's. It was the board's prerogative, the court said, to select the type of teachers it wanted to put in the classroom as long as the decision was not taken to stop an activity protected by the First Amendment or for any other constitutionally impermissible reason and that the Board believed the reason to be true.

The court further illustrated in Branch that even though an interpretation was not requested, the tenure laws provided more protection for the teacher requiring "explicit and clear reasons be given in writing." See Branch P.610, footnote 5. It is well to repeat that in the cases of Yanzick and Branch, competent teachers were terminated. Both the Montana Supreme Court and the Federal District Court were not impressed nor did they find relevant the fact of satisfactory competency or good standing in terms of a teacher's ability. It was the board's prerogative, the courts said, to select the type of teachers it wanted to put in the classroom as long as the decision was not taken to stop an activity protected by the First Amendment or for any other constitutionally impermissible reason. In the case before us, we find that the Board provided a reason which was not constitutionally impermissible. It believed it to be true and its discretion has not been altered. (See transcript and record.)

Other Federal District Courts have affirmed a board's right not to reappoint a nontenured teacher in order to strengthen the staff or to obtain a better teacher. See Powers v. Mancos School District, RE-6, 391 F.Supp. 322 (D. Colo. 1975), aff'd, 539 F.2d 28, (10th Cir. 1976), Phillippe v. Clinton-Prairie School Corp., 394 F.Supp. 316 (S.D. Ind. 1975), Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981).

Not everyone satisfies the prerequisite qualifications necessary to be granted tenure in a particular school district. Tenure is a privilege extended by local school boards which are vested with the power from the community and responsible for education.

Although a board may refuse to keep a competent teacher in order to seek a better one, it may not use the explanation to cover up a nonrenewal for a constitutionally impermissible reason. See Branch, Cookson, Keosaian, Roth v. Board of Regents, 408 U.S. 564 (1972). A board may not refuse to renew a contract when the real reason for nonrenewal is the teacher's race, sex, national origin, or religion or desire to rid itself of a teacher who has criticized the school's administration. Such protections from the First Amendment and other rights from the constitution clearly cannot be the grounds or the basis for nonrenewal of a nontenured teacher. Appellant has not claimed any constitutionally impermissible reason as found in Roth and Keosaian and the record reveals no such evidence.

Non-tenured teachers do not have a vested property interest in the position. The nontenured teacher is employed on a one-year basis, and his/her relationship is defined by a one-year contract. See Section 20-4-201. There are no entitlements to automatic renewal. To allow more will substantially weaken the tenured rights of those deserving teachers who are tenured with the district. This Superintendent has recognized the importance of those tenure rights and cannot allow such an indirect challenge on tenure to weaken the integrity of tenure laws. See Kisling v. School Board, OSPI #14-81, Decision and Order, Knudson v. School Board, OSPI 6-81, Decision and Order, Sorlie v. School District, OSPI #10-81, Decision and Order, affirmed 13th Judicial District Court, September 18, 1982. Whether a nontenured teacher has interests requiring more procedural due process in a dismissal under contract is not presented to this Superintendent and will not be addressed.

This State Superintendent has followed the Montana Administrative Procedures Act in all school controversy appeals made to him pursuant to Section 20-3-107 MCA, and has adopted those Standards of Review in the Uniform Rules of School Controversy see Section 10.6.125, A.R.M.

In striving for excellence in Montana schools, trustees must retain the ability to ensure that the educational school system does not meddle in mediocrity, but strives to achieve standards of excellence in teaching and preparing our youngsters as future adults of this state. Tenure laws are established to protect the excellent teachers we have and to grant a unique employment privilege to those teachers.

In the case before us, we find that the board provided a reason which was not constitutionally impermissible. The board believed it to be true, and its discretion has not been altered. In this case, as in Jones, Appellants have not claimed any constitutionally impermissible reason for their nonrenewal. Therefore, since the reason given for Appellants' nonrenewal is sufficient as a matter of law, there can be no controversy merely because Appellants disagree with the law.

Any hearing would amount to an idle act which is not required by Montana law. See Section 1-3-223 MCA. Until Appellants are granted tenure, their property interest, and their right to accept continued employment, is not vested. Board of Regents v. Roth, 408 US 564 (1972), Akhtar v. Van de Wetering, _____ Mont._____, 642 P.2d 149 (1982). This State Superintendent finds support for the sufficiency of the reason in prior Federal decisions, prior administrative cases and legislative committee minutes and Section 20-4-206(3). Since there are no disputes as to the facts in this case, no evidentiary hearing is required.

An issue of law was presented to this Superintendent and I have found that the reason "to find a better teacher" is legally sufficient under Section 20-4-206 MCA. The

county superintendents did everything in a proper manner. They received the appeal; determined whether they had jurisdiction; found only a legal issue; consulted their legal advisors; and being advised that the law in the area was clear, they rendered their decision.

School boards have the legal responsibility, as well as a moral obligation to their communities, to put the best available teacher in the classroom despite objections from teachers and the unpleasantness that this task often produces. This task further must not create costly legal actions where no further rights exist and which divert precious, limited school monies to these actions.

The County Superintendent's decision is affirmed.

DATED this 23rd day of May, 1983.